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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1042

DAVID B. TERK,
Appellant,

vs.

LADD S. GORDON, Individually and As the Director of the Department of Game and Fish, State of New Mexico; FLOYD TODD, ALBERT J. BLACK, ROBERT H. FORREST, HOUSTON McKENZIE, and EDDIE MUNOZ, Individually and As Members of the State Game Commission, State of New Mexico,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

MOTION TO AFFIRM

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MOTION

Appellees, Ladd S. Gordon, et al., pursuant to Rule 16 of the Supreme Court of the United States, move this Court to affirm the judgment and order entered on October 28, 1977 by the District Court for the District of New Mexico, sitting as a Three-Judge Court pursuant to Title 28 U.S.C. §2281, on the ground that it is manifest that the question on which the decision of the cause depends so unsubstantial as not to need further argument.

QUESTION PRESENTED

Whether the State of New Mexico's statutory scheme governing license fees for recreational hunting, whereby nonresident hunters are charged higher license fees than resident hunters, denies any privileges or rights guaranteed the nonresidents pursuant to the Privileges and Immunities Clause of Article IV, §2 and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

The Statement of the Case contained in Appellant's Jurisdictional Statement, dated January 20, 1978, is hereby adopted and incorporated by reference by Appellees for the purpose of this motion.

ARGUMENT

The Statutory District Court found that the rights asserted by Appellant were recreational in nature and, as such, did not constitute a privilege and immunity protected by Article IV, §2 of the United States Constitution. It further found that, based on the facts before it, residency was a reasonable classification rationally related to a legitimate state object and did not constitute an invidious classification condemned by the Equal Protection Clause of the Fourteenth Amendment (Jurisdictional Statement, Opinion, A13).[1] The license fee scheme set forth in the challenged New Mexico statutes serves the purpose of equalizing the burden of expenditures made by the State of New Mexico for the benefit of its wildlife, which would otherwise be borne solely by its residents (Jurisdictional Statement, Opinion, A13).[2]

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1. For purposes of this motion, Appellees adopt and incorporate by reference the Appendix to Appellant's Jurisdictional Statement.

2. In his Jurisdictional Statement, Appellant notes that this Court has accepted jurisdiction in *Baldwin, et al.* v. *Fish and Game Commission of the State of Montana,* Supreme Court No. 76-1150 and *Massachusetts* v. *Westcott,* Supreme Court No. 75-1775. The *Baldwin* case is more completely cited as *Montana Outfitters Action Group* v. *Fish and Game Commission of Montana,* ..... U.S. ....., 97 S. Ct. 1096, ... L. Ed. 2d ..... (1977). While that case involves the issue of hunting license fee differentials between nonresidents and residents of the State of Montana, it is distinguishable from the present case. In *Baldwin,* the lower court did not base its decision upon a cost allocation equalization as was done in the present case, and in *Baldwin* the lower court found that the state may prefer its residents over nonresidents or condition the enjoyment of a nonresident "upon such terms as it saw fit." In the case at bar, the lower court subjected the license fee differential to a police power analysis. The *Westcott* case is more completely cited as *Commonwealth of Massachusetts* v. *Westcott,* ..... U.S. ....., 97 S. Ct. 1755, 52 L. Ed. 2d ..... (1977). It, as well as the companion case of *Douglas* v. *Seacoast Products, Inc.,* 429 U.S. ....., 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977), dealt with *commercial* fishing disputes and preemption of state law by federal law, under the Supremacy Clause, Article VI, Cl. 2 of the Constitution, which are not issues before this Court in the present case.

An analysis of the argument of Appellant conclusively demonstrates the lack of a substantial federal question put forth by this appeal.

Appellant initially contends that the New Mexico hunting license fee scheme violates the privileges and immunities clause of Article IV, §2 of the Constitution. However, Appellant ignores the *nature* of the activity involved. He does not assert that recreational or sport hunting is a fundamental right or privilege and immunity. Rather, appellant takes a "shotgun" approach based on the general concepts of "comity" between the states and our system of "Constitutional Federalism" as they relate to issues other than the nature of the activity, such as the presence of federal land in New Mexico and the existence of federal assistance to the State for wildlife restoration.[3]

The courts in their analysis of the privileges and immunities clause have consistently used a "fundamental right" analysis based on the *nature* of the right asserted since the earliest interpretation of the clause in *Corfield* v. *Coryell*, 4 Wash. CC 371, 6 Fed. Cas. 546 (No. 3230) (E.D. Pa. 1823). E.g. *Canadian Northern Ry.* v. *Eggen*, 252 U.S. 553 (1920); *Blake* v. *McClung*, 172 U.S. 239 (1898). And see *United States* v. *Wheeler*, 254 U.S. 281 (1920). In *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), this Court considered whether education was a fundamental right entitled to protection of the Equal Protection Clause. In finding no fundamental right involved,

3. It should be noted that in the lower court, Appellant, among other things, claimed that the license fee differential impinged upon and deprived him of his right to use and enjoy federal lands in New Mexico. He also claimed that the license fee differential interfered with his right of interstate travel. Issues related to these purported rights are not raised before this Court by Appellant and are, therefore, not before this Court on appeal.

Mr. Justice Powell set forth the nature of the inquiry required as follows:

> Mr. Justice Harlan, dissenting from the Court's application of strict scrutiny to a law impinged upon the right of interstate travel, admonished that "[v]irtually every state statute affects important rights." *Shapiro* v. *Thompson* 394 U.S. at 655, 661. In his view, if the degree of judicial scrutiny of state legislation fluctuacted depending on a majority's view of the importance of the interest affected, we would have gone "far toward making this Court a 'super-legislature'." *Ibid.* We would, indeed, then be *assuming a legislative role and one for which the Court lacks both authority and competence* (Emphasis added). Mr. Justice Harlan's concern correctly articulates the limits of the fundamental rights rationale employed in the Court's equal protection decisions:
>
> "The Court today does *not* (Emphasis in original) pick out particular human activities, characterize them as 'fundamental,' and give them added protection. . ." To the contrary, the Court simply recognizes, as it must, an *established constitutional right* (Emphasis added), and gives to that right no less protection than the Constitution itself demands." *Id.*, at 642.

The Court went on to further state that the inquiry is whether there is a right explicitly or implicitly guaranteed by the Constitution.

Therefore, the initial inquiry must be to the nature of the right claimed and whether it is an established constitutional right. The right asserted by Appellant is recreational in nature. Sport hunting is not a fundamental right or privilege of national citizenship (Jurisdictional State-

ment, Opinion, A9). If something as basic as education is not a constitutionally recognized fundamental right, how can a recreational or leisure time activity be given greater protection?

Appellant relies heavily upon *Toomer* v. *Witsell*, 334 U.S. 385 (1948) and asserts that it governs the present case. That case is plainly distinguishable from the case at bar. It involved the constitutionally recognized privilege of a citizen of one state to do business in another state. Involved was the challenge of a South Carolina Statute charging a higher license fee for a Georgia resident than a South Carolina resident for *commercial* shrimping within the three-mile maritime belt. *Toomer* involved migratory species and the virtual exclusion of nonresidents in the context of constitutionally protected commercial activity. Appellant has not challenged the lower court's finding that the animals here in issue are not migratory (Jurisdictional Statement, Opinion, A5) and it is not alleged by Appellant in this Court that the challenged statutory scheme is totally exclusionary as to nonresidents, nor was any evidence to this effect presented to the lower court. The lower court analyzed *Toomer* and found it did not govern sport hunting (Jurisdictional Statement, Opinion, A10-A11).

Apparently conceding that sport hunting is not a constitutionally recognized privilege and immunity, Appellant has sought to bring his alleged right, whatever it may be classified as, under the broad umbrella of "Constitutional Federalism". In this quest Appellant has relied upon *Austin* v. *New Hampshire*, 420 U.S. 656 (1975). In that case the State of New Hampshire imposed a tax on out-of-state commuters earning income in the state, but through a series of statutory provisions exempted residents from payment of any tax on income earned in the

State. In striking down the commuters' tax, the Court re-examined the historical basis of the Privileges and Immunities Clause. That historical basis does not grant Appellant constitutional recognition of his recreational right. The present case does not involve a tax measure challenged as an undue burden on an activity granted special constitutional recognition. The lower court recognized this in its treatment of the general principles of *Austin* as applied to recreational hunting, and found that Appellant's recreational rights were *not* granted constitutional recognition by *Austin* (Jurisdictional Statement, Opinion, A9).

Appellant makes much of the fact that a large portion of the land in New Mexico, open to free public hunting, is found on federal land administered by the Bureau of Land Management or National Forest Lands administered by the Forest Service. The presence of federally owned land providing significant big game habitat does not transform recreational hunting into a fundamental right protected by the Privileges and Immunities Clause. As a preliminary matter in its opinion, the lower court properly came to this conclusion:

> The plaintiff argues that state regulation of animals interferes with his rights as an American citizen to enjoy public lands. We find no provision of federal law supporting this argument, but we do find a few which refute it. Section 1133(d)(8) of Title 16 states that nothing in the Wilderness Preservation Act should be construed as affecting the jurisdiction and responsibilities of the several states with respect to wildlife in national forests. The same policy applies to other public lands. The Department of Interior recognizes state authority to control and regulate hunting of wildlife on public land while authority to control the habitat is vested in the United States. 43

C.F.R. Part 24-1[4] (Jurisdictional Statement, Opinion, A7).

The issue of State regulation of hunting on federal lands located within its borders relates only to the relationship between the states and the federal government in the context of the Property Clause and the Supremacy Clause. In *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976) this Court upheld, against constitutional challenge by the State of New Mexico, the Wild Free-Roaming Horses and Burros Act which protects feral animals on the public domain. It was held that by virtue of the Property Clause of the Constitution, Article IV, §3, Cl. 2, Congress exercises the powers of both a proprietor and a legislature over the public domain. State hunting license regulations are applicable on public lands and there is no occasion for exercise of the Supremacy Clause because federal sovereignty is not threatened. See *Federal Legislative Jurisdiction, Report Prepared for the Public Land Review Commission, U.S. Department of Justice,* 37 Washington, D.C. (May 1969).

Appellant also makes much of the fact that New Mexico receives substantial federal revenue through the Pittman-Robertson Act, Title 16, U.S.C. §669, et seq.[5] The Pittman-Robertson Act, which imposes a federal excise tax on sport equipment and appropriates the proceeds to the states and territories for wildlife restoration, similarly does not convert recreational hunting into a fundamental right protected by the Privileges and Immunities

4. See Footnote 3.

5. Appellant also refers to the Dingell-Johnson Act, Title 16, U.S.C. §777, et seq. This statute is not properly before this Court. It deals with the appropriation of federal monies to the various states and territories for *fish* restoration and management projects. Appellant did not take issue in the lower court with the New Mexico Statutes governing fishing licenses.

Clause. The lower court also properly disposed of this issue:

> We see nothing significant in the fact that the state receives substantial federal Wildlife Restoration funds pursuant to the Pittman-Robertson Act to carry out the New Mexico Wildlife Conservation Act, N.M.S.A. 53-2-50 through 53-2-59 (1953 Comp.). The fact that the source of federal revenues is a federal excise tax on some hunting equipment does not by itself operate to give citizens of other states a claim to the common property of New Mexico citizens held in trust by the state. There is nothing in the Act, legislative history of administrative regulations to show that Congress intended the result Plaintiff is seeking as a condition of receiving federal assistance and we cannot infer such a purpose from the general purpose of the legislation; to preserve wildlife for the enjoyment of the people. 43 C.F.R. Part 17; 50 C.F.R. Part 80; 1970 U.S. Code Congressional and Administrative News 4353 (Jurisdictional Statement, Opinion, A8).

Finally, as near as Appellees can determine from a reading of Appellant's Jurisdictional Statement, Appellant claims that comity among the states is threatened by the hunting license fee differentials between residents and nonresidents.

This practice of hunting license fee differentials between residents and nonresidents has long been sanctioned by the courts and has not been cause of friction between the states necessitating federal intervention.[6] E.g., *In re*

6. In the Court below the New Mexico hunting license fee differential was supported by amicus curiae, International Association of Game, Fish and Conservation Commissioners, which is

(Continued on following page)

Eberle, 98 Fed. 295 (C.C. Ill. 1899), and *State* v. *Kemp*, 73 So. Dak. 458, 44 N.W. 2d 215 (1950), appeal dismissed for want of substantial federal question, 340 U.S. 923 (1951).

Having disposed of Appellant's various theories seeking to find an applicable constitutionally recognized right, the lower court proceeded to subject the questioned New Mexico statutory scheme to a police power or equal protection analysis (Jurisdictional Statement, Opinion, A8-A14). Appellant makes the erroneous allegation that, as a result of the lower court's opinion, New Mexico has been provided with "carte blanche" power to charge nonresident hunters any amount it desires.

The states have a special power over fish and wildlife within its borders which has long been recognized by the courts:

> A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers. *Toomer* v. *Witsell, supra* (concurring opinion of Frankfurter, J.).

Stemming from this special power, the states have traditionally favored residents in connection with sport hunting license fee requirements. This historical tradition has been approved by the courts which have never denied the power of the states to impose higher license fees for sport hunting on nonresidents.

Footnote continued—

an organization whose membership represents the fish and game agencies of all fifty states. Also the states of Idaho, Colorado, Utah, Wyoming and Oregon appeared individually as amicus curiae and supported New Mexico's position.

Subject to restraints imposed by the Constitution, a state may regulate the taking, subsequent use, and property rights that may be acquired in wildlife. *Lacoste* v. *Dept. of Conservation*, 263 U.S. 545, 549 (1924).

This special power of the states is founded on the dual basis of "trustee or ownership" and "police power". *Kleppe* v. *New Mexico, supra.*[7]

Appellant claims that New Mexico's license fee structure effectively establishes two classes of hunters based solely on residency, and that such classification constitutes invidious discrimination prohibited by the equal protection clause of the Fourteenth Amendment. The lower court succinctly disposed of that contention:

> This test applies so long as the classification is not based on a suspect criteria or does not affect a fundamental right. *Residency is not a suspect criterion*, and the scheme does not penalize recent interstate movement. The travel argument was rejected in *American Commuters* v. *Levitt* [279 F. Supp. 40 (1967), Aff'd 405 F.2d 1148 (1969)] and *Toomer* [*supra*] type restrictions were indicated to be distinguishable from durational residency requirements in *Dunn* v. *Blumstein*, 405 U.S. 330, 340-342 notes 9-13 (1972). (Emphasis added) (Jurisdictional Statement, Opinion, A13).

Appellant further contends apparently, that the lower Court erroneously refused to apply the test of legislative classification (it is assumed Appellant is referring to the

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7. The Statutory District Court recognized that under either the "trust or ownership" or "police power" theories, New Mexico has the power to manage and conserve its wildlife and to promulgate laws pursuant to that power. The court in its analysis found it unnecessary to choose between these theories (Jurisdictional Statement, Opinion, A12). Therefore, this issue is not before this Court on appeal.

"strict scrutiny" or "compelling state interest" test) under its police power or equal protection analysis, and, instead utilized the more liberal "rational relationship test." The Court stated:

> Sport hunting is not a fundamental right or privilege of national citizenship. There are, therefore, no impediments to applying the rational relationship test. We find the disparity in fees charged nonresidents to be reasonable and within the police power of the state. With the exception of three licenses; Cougar, Barbary Sheep and Bighorn Sheep, the nonresident fee ranges from three to six times the resident fee. We feel the State has made a sufficient showing that nonresidents receive the benefits of state general fund expenditures which justify the fee differential (Jurisdictional Statement, Opinion, A13).

See also *San Antonio School District* v. *Rodriguez, supra.*

When all other issues are disposed of, in reality, Appellant in this appeal merely seeks to have the Court review the fact determination made by the Statutory District Court on the record before it, hardly a substantial federal question.

The legislative acts and practices of the State of New Mexico and its officers enjoy a presumption of regularity, validity and reasonableness. The Supreme Court of New Mexico in reviewing the state's game laws stated:

> Here we have a statute aimed to conserve the property of the state which it holds in trust for the public. It should be given a liberal construction to sustain its validity, and it cannot be set aside unless it clearly violates the organic law of the nation or state. *State* v. *Heffernan*, 41 N.M. 219, 227, 67 P.2d 240, 244 (1936).

E.g. *Rast* v. *VanDeman & Lewis Co.*, 240 U.S. 342 (1916); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945); *New York Rapid Transit Corp.* v. *New York*, 303 U.S. 573 (1938).

Appellant goes to great length to attempt to convince this Court, as he did the Statutory District Court, that the State of New Mexico failed to make a sufficient showing that nonresidents receive the benefits of state general fund expenditures which justify the license fee differential. In his attempt, Appellant seeks to distinguish the tuition cases cited by the lower court in its decision.[8] The principal thrust of Appellant's argument is to urge adoption of the narrow view that, in order to take into account indirect cost benefits from general appropriations provided to other state agencies, the New Mexico Department of Game and Fish and State Game Commission must pay the other agencies for these benefits or "reimburse the State" for these benefits. This view ignores the context in which these cost benefits must be and were considered by the lower court; the classification of residency. The State clearly demonstrated, based upon evidence not objected to by Appellant, that nonresident sport hunters benefit from general fund expenditures expended by other state agencies. Appellant cites no authorities to the effect the cost allocation must be between *state agencies,* rather than between *residents* and *nonresidents*; nor do the cases relied upon by the lower court so hold. On the one hand, there are state residents who have, through various revenue raising means, contributed funds toward the operations of state agencies which preserve, protect and enhance the

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8. *Starns* v. *Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), aff'd per curiam, 401 U.S. 985 (1971); *Clarke* v. *Redeker*, 259 F. Supp. 117 (1966), cert. den., 396 U.S. 862 (1966); and *Sturges* v. *Washington*, 368 F. Supp. 38 (1973).

wildlife of the state and provide greater opportunities for both resident and nonresident hunters. And, on the other hand, there are nonresidents who do not make the contributions made by residents.

The State only need make a reasonable attempt to achieve partial cost equalization. Mathematical precision is not required (Jurisdictional Statement, Opinion, A13, A14).

Finally, Appellant contends that the lower court, in its consideration of the legitimate state object involved, refused to recognize or consider the fact of the existence of public domain lands and federal funding. As stated, *supra*, the lower court carefully considered these factors and properly found them inapplicable in giving Appellant any constitutionally protected right, which decision is equally applicable in this context

CONCLUSION

In summary, there is no substantial question raised by this appeal. The Statutory District Court properly found that Appellant's alleged recreational right was not a fundamental right recognized as a constitutionally protected privilege and immunity.

The Court did not then find that the state had "carte blanche" power to charge nonresident hunters any amount it desired. Rather, the court subjected the challenged statutory scheme to a police power or equal protection analysis and, on the facts before it, found that the classification involved (residency) was reasonable and rationally related to a legitimate state object (partial cost equalization).

For the foregoing reasons, Appellees respectfully submit that no substantial federal question is raised by this appeal and the judgment of the United States District Court for the District of New Mexico should be affirmed by this Court.

Dated this 2nd day of March, 1978.

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